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IN THE

Supreme Court of the United States

H&R BLOCK, INC.; H&R BLOCK SERVICES, INC.;
H&R BLOCK EASTERN TAX SERVICES, INC.;
BLOCK FINANCIAL CORP.; and HRB ROYALTY, INC.,
Petitioners,

v.

LYNNE A. CARNEGIE, on behalf of herself
and all others similarly situated,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF

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In the Brief in Opposition, Respondent fails to offer any coherent and persuasive argument against a grant of review. First, while never denying that a conflict exists among the circuits on the question of how the element of individual reliance should factor into the class certification inquiry in RICO fraud cases, Respondent tries to bypass the problem. She states that her case is based only on fraudulent omissions rather than fraudulent misrepresentations and then makes the extraordinary claim that "RICO violations concerning uniform omissions [do not] require individual reliance." Opp. 6. That response is inapt both factually – because Respondent's case relies substantially on alleged affirmative misrepresentations – and legally – because the case law does not remotely support the notion that a plaintiff alleging a fraudulent omission may dispense with proof of reliance. The Seventh Circuit recognized that it was departing radically from the rule applied elsewhere in deciding that it was appropriate to convene a 17-million-person class trial to decide whether misleading statements or omissions had occurred, while leaving the issue of individual reliance to be addressed on a person-by-person basis in subsequent satellite proceedings. Respondent does not and cannot show that the court of appeals erred in saying that the conflict was implicated in this case.

As for the application of judicial estoppel to class settlement proceedings, Respondent ignores entirely both the unfairness and the impracticality of the Seventh Circuit's utterly novel ruling. The decision to apply judicial estoppel and waiver based on a defendant's advocacy of a class settlement threatens to undermine what has become a cornerstone of class-wide litigation, the global settlement class. It is unfair to defendants, who must decide whether to accept a beneficial settlement, knowing that if the settlement is not approved they will be charged with giving up important arguments against class certification. And it is

unfair as well to absent class members, who are deprived of the opportunity to have the one party with the incentive and ability to raise certification concerns as the case thereafter proceeds to full litigation.

1. Respondent does not deny or attempt to explain away the split among circuits, specifically highlighted by the Seventh Circuit, over whether the necessity of proving individual reliance should be a factor in weighing whether individual issues predominate over common issues when class actions based on RICO mail and wire fraud are certified. She seems to suggest at times that individual reliance never needs to be proved to show a violation of RICO, at least in the class action context. *See* Opp. 6, 12. But that argument fails in light of *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which holds that civil RICO actions based on mail or wire fraud include an element of causation of injury, which in this case requires proof of individual reliance. Certainly there is no justification for treating the elements of a RICO violation differently just because they arise in a class context. Nor did the Seventh Circuit explain how the element of reliance could properly be treated as part of the damages determination rather than a part of the liability inquiry. It simply brushed past that question in its haste to find a way to adjudicate some common issue and put the defendants in a position where a larger settlement would become inevitable.[1]

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[1] No case cited by Respondent from outside the Seventh Circuit endorses such a novel approach. Many of the cases cited by Respondent have nothing to do with the issue at hand. Another, *Rodriguez v. McKinney*, 156 F.R.D. 112 (E.D. Pa. 1994), actually decided *against* certifying a class on a uniform omission claim due to the "complex and individualized issues" created by individual reliance issues. *Id.* at 116. Respondent also cites decisions recognizing a rebuttable presumption of reliance in order to find the class suitable for certification, whether in the context of securities litigation, *see Waters v. International Precious*

As for the distinction between fraudulent omissions and affirmative misrepresentations, it does nothing to help Respondent dodge this problem. For one thing, Respondent's Complaint itself alleges both omissions and misrepresentations, including deceptive advertising.[2] Moreover, as a legal matter, the distinction is pulled out of thin air. Respondent points to not a single case in which a court considering whether to certify a class drew a distinction between affirmative misrepresentations and omissions. Reading between the lines, the notion seems to be that omissions are, or at least can be, particularly "uniform" in nature. *See* Opp. 6. But the law recognizes nothing of the kind. What the cases actually say is that uniform statements *or* omissions are a necessary but not sufficient condition for showing that common issues predominate over individual ones. In almost all cases where allegedly fraudulent representations or omissions are not uniform, the individual issues will predominate, but the converse is not true. The mere fact that representations or omissions *are* uniform does not make all the individual issues in the litigation, such as the circumstances of personal reliance, simply disappear.

Metals Corp., 172 F.R.D. 479 (S.D. Fla. 1996), or in consumer fraud cases, *see Spark v. MBNA Corp.*, 178 F.R.D. 431 (D. Del. 1998). But that approach is equally inconsistent with the Seventh Circuit's rule that reliance need not even be considered by a court, and it also fails to solve the predominance problem in most cases because it simply shifts the burden of proof on the predominant individual issue.

[2] The Complaint quite clearly alleges deceptive and misleading advertising and marketing as a counterpart to Block's alleged failure to disclose certain facts. ¶¶ 40, 66-70, 75, 165. Additionally, the Complaint claims that the disclosures made by Block on the RAL application are intentionally misleading in their own right. ¶¶ 145, 146, 148. The district court in fact described the web of Respondent's allegations as a "complex . . . scheme," Pet. App. 14a, and the Seventh Circuit's characterizations of the facts of the case in passing are not to the contrary.

For example, in *Poulos v. Caesar's World, Inc.*, 379 F.3d 654 (9th Cir. 2004), involving misrepresentations and omissions in statements to casino gamblers, the focus of the court's decision was how to determine the cause of the individual plaintiff's conduct after receiving the alleged misrepresentations. The court held that the inquiry into whether putative class members' relied on the statements was complex, different as among class members, and predominant over common issues. As contrasted with other cases involving reliance, "gambling is not a context in which we can assume that potential class members are always similarly situated. Gamblers do not share a common universe of knowledge and expectations — one motivation does not 'fit all.'" *Poulos*, 379 F.3d at 665. However, *no court in the Seventh Circuit* could possibly reach this conclusion, because the Seventh Circuit now treats such issues of individual motivation as collateral to the alleged deceptive scheme itself, and encourages such concerns to be banished to satellite proceedings. Pet. App. 9a-10a.

Similarly, in *Klay v. Humana, Inc*, 382 F.3d 1241 (11th Cir. 2004), *pet. for cert. filed sub nom, United Health Group, Inc. v. Klay*, 73 U.S.L.W. 3260 (U.S. filed Oct. 19, 2004) (No. 04-522), the court staked out a middle ground between the positions of the Fifth and Seventh Circuits in evaluating whether reliance issues predominated over common issues. It held that on the facts of the case, the need to prove reliance did not preclude class adjudication. But it did not say that the existence of uniform misrepresentations or omissions was enough by itself.

Finally, there is the Fifth Circuit's position expressed in *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205 (5th Cir.), *cert. denied*, 540 U.S. 819 (2003). That court, as we have noted, ruled that the need to prove individual reliance precludes certification of any

RICO fraud class actions. *See id.* at 218-19. This is exactly the approach the Seventh Circuit rejected in its opinion below. Pet. App. 10a. Indeed, the Seventh Circuit's holding abandons considerations of particular facts about individual reliance as unnecessary and best dealt with in satellite proceedings, or, by bludgeoning defendants into settling the case, not at all. This both conflicts with other circuits and is legally untenable as a matter of substantive RICO and class action law.

2. In a final effort to evade review of the conflict among the circuits, Respondent argues that the estoppel rulings of the courts' below bar Petitioners from contesting whether individual issues predominate under Fed. R. Civ. P. 23(b)(3) at this stage of the litigation. Citing *Amchem Products. v. Windsor*, 521 U.S. 591, 62-21 (1997), she suggests that only the issue of "manageability" at trial remains to be decided because all other issues were fully presented during the settlement approval process. *See* Opp. 11-12. This argument disregards the text of Rule 23(b)(3), which makes clear that manageability is just one component of the predominance inquiry. Thus, if a defendant remains free to contest the manageability of a case for trial after a class settlement is rejected, as Respondent concedes, the exact same argument can also be framed in the language of predominance – as occurred here. Indeed, the Seventh Circuit recognized this implicitly when it addressed the varying circuit rules on how reliance should factor into the certification issue – rules that are premised on concerns about predominance but incorporate concerns about manageability as well. *See* Pet. App. 6a-7a.

3. Respondent does not really dispute the novelty of the Seventh Circuit's application of judicial estoppel and waiver in the class settlement context. Instead – while ignoring the cases and authoritative commentators cited in the Petition for

the proposition that after rejection of a class settlement a defendant should be able to raise all arguments against certification, *see* Pet. at 26 – she characterizes the Seventh Circuit's ruling as "fact-specific," Opp. 10-11. That is hardly responsive to Petitioners' argument that estoppel and waiver should not have been applied at all in the class settlement context. Nor does Respondent even address Petitioners' point that parties settling cases are not generally bound to specific positions they adopted in settlements. *See* Pet. 26-28.

Respondent complains repeatedly that Petitioners and their codefendants sought to enjoin other overlapping lawsuits during the temporary existence of the settlement. But that argument misunderstands the law of judicial estoppel, both as this Court has articulated it and the Seventh Circuit applied it. Judicial estoppel is concerned with a party advocating a position that is clearly inconsistent with a party's previous position that it persuaded a court to adopt. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). Petitioners' attempt to seek the benefit of the approved settlement class in other courts does not mean that it was advocating a particular position about the legal adequacy of a class certification. *See* Pet. 25-27. Rather, Respondent's position begs the question at the heart of this case: whether a party's agreement to settle a class action should be treated as making a binding representation to the court about the bases for class certification.

The policy implications of adopting such a rule are undeniably significant. Henceforth, defendants thinking about settling class cases will know that the could end up facing litigation without the ability to contest class certification. One might suppose that defendants can avoid this risk by assuring that their settlements are adequate and fair to all class members. Often, defendants consider a case

frivolous but are willing to settle for a fraction of the theoretical exposure. But such settlements can easily end up being rejected if the court takes a different view of the merits and concludes fairness requires more relief for the class.

Moreover, under the Seventh Circuit's rule, once a settlement is rejected as insufficient, there is no party – not the class representative, not the defendant, and not the absent class members – in a position to raise the full range of possible certification concerns as the case proceeds to be litigated. For that reason as well, it makes no sense to estop defendants from raising arguments that can be essential if courts are to comply with their ongoing obligation to protect the class members.

CONCLUSION

Both questions presented in the Petition are important and require immediate review by the Court.

Respectfully submitted,

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